STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN DANIEL ELLESIN,

Defendant-Appellant.

UNPUBLISHED
October 16, 2003

No. 240342
Oakland Circuit Court
LC No. 2001-178122-FC

Before: Fitzgerald, P.J., and Zahra and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of thirteen to twenty-five years. He appeals as of right. We affirm, but remand for the limited purpose of correcting the Sentencing Information Report.

I. Eleven-member Jury

Defendant first argues that the trial court improperly submitted this case to an eleven-member jury after one of the jurors failed to report to court. Although defendant agreed on the record to proceed with eleven jurors, he now maintains that reversal is required because the trial court did not specifically inform him of his right to a twelve-member jury before obtaining his consent to continue with eleven jurors, or ascertain that he understood that he had a right to a twelve-member jury. MCR 6.410(A).

Because neither defendant nor trial counsel registered an objection to proceeding without a twelve-member jury, or the manner in which the court secured defendant's personal waiver, we view this issue as unpreserved. Accordingly, we review the issue for clear or obvious error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

MCR 6.410(A) allows a criminal trial to proceed in the absence of twelve jurors upon stipulation of the parties. The rule provides, in pertinent part:

> (A) Number of Jurors. Except as provided in this rule, a jury that decides a case must consist of 12 jurors. At any time before a verdict is returned, the parties may stipulate with the court's consent to have the case decided by a jury

> consisting of a specified number of jurors less than 12. On being informed of the parties' willingness to stipulate, the court must personally advise the defendant of the right to have the case decided by a jury consisting of 12 jurors. By addressing the defendant personally, the court must ascertain that the defendant understands the right and that the defendant voluntarily chooses to give up that right as provided in the stipulation. If the court finds that the requirements for a valid waiver have been satisfied, the court may accept the stipulation. Even if the requirements for a valid waiver have been satisfied, the court may, in the interest of justice, refuse to accept a stipulation, but it must state its reasons for doing so on the record. The stipulation and procedure described in this subrule must take place in open court and a verbatim record must be made.

In the instant case, the following exchange occurred between defendant and the trial court:

> THE COURT: Okay. All right. What has happened, Mr. Ellesin, is that one of the jurors decided not to come back this morning and she's up in Cadillac, Michigan. So she's going to have to report here Monday morning and she'll be held in contempt of court for not coming in. So I've asked the two attorneys to stipulate that the 11 that are left can deliberate without her and that's what we wanted to see, if you are in agreement with that.
>
> THE DEFENDANT: All right. Yeah.
>
> THE COURT: Is that okay?
>
> THE DEFENDANT: Yep.
>
> (Defense counsel): Yes - - yes, ma'am.
>
> THE DEFENDANT: Yes ma'am.

The trial court plainly erred by failing to "personally advise [] defendant of the right to have the case decided by a jury consisting of 12 jurors." MCR 6.410(A). However, the error does not warrant reversal. Although a defendant's waiver of the constitutional right to trial by a twelve-member jury must be voluntary, knowing and intelligent, see *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993), the extensive explanation of this right suggested by defendant in his brief on appeal is not required in Michigan, see, e.g., *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992).

Here, the trial court explained the reasons surrounding the juror's absence, stated that it had asked defense counsel to stipulate to proceeding with an eleven-member jury, asked defendant whether he was in agreement with that decision, and sought defendant's consent to continue the trial with only eleven jurors. The court's inquiry was sufficient to ascertain whether defendant was voluntarily waiving his right to a twelve-member jury. Although the court did not specifically ask defendant whether he understood his right to a twelve-member jury at that time, the court had earlier referred to that right, in defendant's presence, during jury voir dire. Further, defendant's agreement to proceed with eleven jurors was unequivocal, and there is no suggestion

in the record that defendant did not understand that he had a right to a twelve-member jury, or that he acted involuntarily. We also note that defendant was not a stranger to the criminal justice system, a fact that supports a finding that his waiver was effective. See *People v McElhaney*, 215 Mich App 269, 275; 545 NW2d 18 (1996). In short, notwithstanding the court's failure to strictly comply with MCR 6.410(A), the record does not support, nor has defendant shown, that defendant's decision to proceed with an eleven-member jury was not knowingly and voluntarily made, such that defendant's substantial rights were affected. Therefore, reversal is not warranted on the basis of this unpreserved issue. See *Carines*, *supra* at 763-764.[1]

Defendant further complains that the trial court erred by directing a court clerk to advise the eleven-member jury, outside the courtroom, to continue with deliberations. Again, because defendant did not object to this manner of communication at trial, we review this unpreserved issue for plain, prejudicial error. Defendant likens this situation to one involving a trial court's improper *ex parte* communication with a jury, without the knowledge of counsel. See MCR 6.414(A); *People v France*, 436 Mich 138; 461 NW2d 621 (1990). Here, however, both the prosecutor and defense counsel were consulted before the communication was given. Further, the substance of the communication was placed on the record before the clerk advised the jury to continue deliberating. Also, the substance of the communication was principally administrative, see *id.* at 163-164, and there has been no showing that defendant was prejudiced by it. Accordingly, no basis for reversal has been shown.

We likewise find without merit defendant's related claim that counsel was ineffective for failing to request a continuance until the missing juror returned, and by failing to more fully explain to him the consequences of his decision to proceed without the missing juror. Because defendant failed to move for a new trial or an evidentiary hearing regarding the issue of ineffective assistance of counsel, our review of this issue is limited to the present record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Thew*, 201 Mich App 78, 90; 506 NW2d 547 (1993).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient in that, under an objective standard of reasonableness, he was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). He must further show that the deficiency was so prejudicial that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different. *Id.*

The decision whether to seek a continuance because of the missing juror was a matter of trial strategy. See *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Counsel conceivably may have believed that the missing juror would not have been a positive influence on the other jurors, or was not as supportive of the defense position as some other jurors. We will not second-guess matters of strategy. *People v Williams*, 240 Mich App 316, 331-332; 614

[1] Although MCR 6.410(A) provides for a stipulation by the parties to proceed with less than twelve jurors, we do not believe that the trial judge should be the one to suggest to the parties that the trial proceed with a specified number of jurors less than twelve.

NW2d 647 (2000). Further, it is not apparent from the record whether defense counsel discussed the option of proceeding with eleven jurors with defendant and, if so, to what extent. Thus, the record does not support defendant's claim that counsel was deficient in this regard.

II. Sufficiency and Great Weight of the Evidence

Defendant next argues that the evidence was insufficient to support his conviction. We disagree. Defendant principally argues that the evidence against him was insufficient because it consisted of a "pyramid of inferences." However, contrary to what defendant argues, circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Even an inference based upon an inference is sufficient to establish an element of an offense. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In this case, the complainant testified that defendant robbed him at gunpoint and took his wallet, and the complainant's driver's license and credit cards were found in defendant's possession when he was arrested shortly after the offense. In addition, defendant made a number of inculpatory statements to police officers and a jail informant admitting his involvement in the charged offense. Viewed most favorably to the prosecution, the evidence was sufficient to support defendant's conviction of armed robbery. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant also argues that the jury's verdict was against the great weight of the evidence. Because defendant did not preserve this issue by raising it in a motion for a new trial, *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763. A new trial may be granted where the evidence preponderates heavily against the verdict so that a miscarriage of justice would result if the verdict were allowed to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Here, although defendant argues that the witnesses against him were not credible, he has not identified (1) testimony that contradicts indisputable physical facts or laws, (2) testimony that is both "material and so inherently implausible that it could not be believed by a reasonable juror," or (3) "testimony that has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" See *People v Lemmon*, 456 Mich 625, 644; 576 NW2d 129 (1998), quoting *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992), and *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985). As previously discussed, the evidence reasonably supports the jury's verdict. Therefore, plain error has not been shown.

III. Opening Statement

Defendant argues that defense counsel was ineffective for failing to give an opening statement. We disagree. The decision whether to give an opening statement is a matter of trial strategy, *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989); *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972), and it is not apparent from the record that counsel's decision was unsound. *Williams, supra* at 331-332; *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983).

IV. Failure to Preserve Evidence

Defendant next maintains that he was denied a fair trial because the police returned the complainant's wallet to the complainant, instead of preserving it as evidence for fingerprint analysis or other testing. Defendant failed to preserve this issue in the trial court, thus limiting our review to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. At trial, defendant admitted that he took the complainant's wallet, albeit allegedly as security for money given to the complainant to purchase cocaine, and that he searched through the wallet when the complainant failed to return. Considered in this context, defendant has not established a plain error.

V. Prosecutor Misconduct

Defendant next argues that he was denied a fair trial because a police witness expressed a belief in the complainant's credibility during questioning. It is improper for a witness to comment or provide an opinion on the credibility of another witness, because matters of credibility are to be determined by the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, defendant is not entitled to reversal on this basis.

First, we are not convinced that the officer's testimony was improper under *Buckey* because, viewed in context, the testimony appears not so much to have been intended as a comment on the complainant's credibility, but as an explanation for why the officer determined that it was not necessary to submit the BB gun and handcuffs found in defendant's possession at the time of his arrest for fingerprint analysis. Under these circumstances, the testimony was not improper.

Nevertheless, even if erroneous, defendant cannot demonstrate prejudice requiring reversal. The trial court sustained defense counsel's objection to the testimony and struck the portion of the officer's first answer in which he directly commented on the complainant's credibility. In addition, the trial court gave several cautionary instructions, advising the jury that it was to decide the facts of the case, that the lawyer's comments were not evidence, and that the jury was to make the ultimate decision whether a witness was credible. A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The court's instructions were sufficient to cure any perceived prejudice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

We also reject defendant's related ineffective assistance of counsel claim, because defendant has failed to show that he was prejudiced by the alleged deficiency. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

VI. Cumulative Error

Defendant argues that the cumulative effect of several errors deprived him of a fair trial. Where individual errors would not warrant reversal, the cumulative effect of several minor errors might sometimes warrant reversal. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). That is not the case here, however. Defendant was not denied a fair trial.

VII. Sentencing Guidelines Scoring Error

Lastly, defendant maintains that the trial court erred by scoring fifty points for offense variable seven ("OV 7"), on the basis that he engaged in conduct designed to terrorize the complainant. At the time of the charged offense, MCL 777.37(1)(a) provided that fifty points may be scored for OV 7 where the victim was "treated with terrorism, sadism, torture, or excessive brutality." The statute defined "terrorism" as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a).[2]

"Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). In this case, the evidence at trial disclosed that, in addition to producing a gun and demanding the complainant's money, defendant held the gun close to the complainant's head and threatened to kill him. Additionally, he handcuffed the complainant to the steering wheel of the complainant's car, and then subsequently entered his own car and drove it toward the complainant in a manner that caused him to fear that defendant was returning to kill him. Under the totality of the circumstances, there was sufficient evidence to support the trial court's scoring decision. *Hornsby*, *supra* at 468-469.

Although we affirm defendant's sentence, both parties agree that the scoring changes discussed at sentencing were not recorded on the Sentence Information Report. We therefore remand for the limited purpose of correcting the Sentence Information Report to reflect the scoring changes made at sentencing. MCR 6.435(A).

Affirmed and remanded for the limited purpose of correcting defendant's Sentence Information Report. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Karen M. Fort Hood

I concur in result only.

/s/ Brian K. Zahra

[2] Pursuant to 2002 PA 137, effective April 22, 2002, terrorism was deleted from the list of enumerated conduct that would warrant a score of fifty points for OV 7. Terrorism is now defined in OV 20 to include behaviors associated with the use or the threat to use biological, chemical, or radioactive devices or substances, or incendiary or explosive devices. MCL 777.49a. The prior version of MCL 777.37 applies to this case. See MCL 769.34(2).